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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1021

MARY LEE LAKE, LEWIS W. LAKE,
Petitioners.

v.

BURL A. SAWYERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

LEWIS W. LAKE,
3003 N. Charles Street,
Baltimore 18, Maryland.

The Daily Record Co., Baltimore 3, Md.

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IN THE

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MARY LEE LAKE, LEWIS W. LAKE,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States.

Your petitioners pray that a writ of certiorari issue to review the decisions and final decree rendered in the Circuit Court of Hardy County, West Virginia, in the above styled case.

OPINION. The Judge's opinion in this case was officially filed June 7, 1962, but was not reported (Appendix I, p. 31).

JURISDICTION, grounds on which invoked. This is a case in equity to enjoin the defendant Burl A. Sawyers from continuous trespassing on the plaintiffs' land located in

Wardensville, Hardy County, West Virginia, bordering on Route 259.

The suit was brought in the Circuit Court of said county, a constitutional tribunal of this State, under Sec. 12, Art. 8. The bill of complaint was filed April 11, 1962. The defendant filed "Motion to Dismiss" May 4, 1962. The motion was argued June 1, 1962. The court dismissed the case for want of jurisdiction, without prejudice to the plaintiffs to bring the case in a court having jurisdiction over the matters complained of (App. II, p. 35).

The motion to dismiss does not refer to jurisdiction but the judge in his opinion said:

> "The motion to dismiss does not squarely say that the action should be dismissed because of wrong venue, but Ground 1, is so worded that in the court's decision will treat it for all practical purposes as being the issue involved."
>
> "For some reason the Legislature saw fit to pass a law which fixed the venue when any state agency is involved Chap. 14, Art. 2, so states (Section 1144(2) Code 1955, W. Va.), hereinafter referred to as Sec. 1144(2). Excerpts: Suits against state agents, 'shall be brought and prosecuted only in the Circuit Court of Kanawha County, West Virginia'." (p. 8).

West Virginia has 55 counties, each county has a circuit court, the words of jurisdiction being identical, Article 8, Section 12, Constitution, W. Va., hereinafter referred to as Art. 8, Sec. 12. Excerpts, "They shall, except in cases confined exclusively by this constitution to some other tribunal, have original and general jurisdiction of all matters of law . . . and cases in equity. . . ."

The appellate court in *Whalen v. Rummel*, 78 W. Va. 196, settled the question of jurisdiction for injunction to stop

trespass. ". . . suits must be brought in the county where the land is situated."

The plaintiffs' suit is for an injunction to stop a continuing trespass on land situated in Hardy County, but the court decreed it had no jurisdiction.

Excerpt from court's opinion (at p. 33):

> "This court is of the opinion that there would be no question concerning the relief requested . . . if the proceedings had been brought in Kanawha County, also this court is of the opinion from the facts alleged and not denied, and likely cannot be successfully contested . . . this court is of the opinion from the pleadings and argument of counsel, and admissions made, that the State Roads Commission does not own all the right-of-way in controversy, and that they are in fact trespassing on the property owned by the plaintiffs, and to that extent their acts of trespassing are illegal."

The court dismissed the case for lack of jurisdiction.

The defendant is State Roads Commissioner of West Virginia. His acts of trespass are forbidden by federal and state constitutions, and are beyond the scope of his authority as Commissioner. Based on these facts the suit was brought against the defendant individually. Illegal acts of a state agent cannot be charged to the state. The plaintiffs feel that Sec. 1144(2) is not applicable to the instant case, and the lower court erred in basing his decree on it as the sole authority for the decree.

DECREE. The decree is not dated but was recorded by the court of Hardy County, W. Va. July 13, 1962 (App. p. 34).

Pursuant to the decree the court filed his certificate of questions to the Supreme Court of Appeals, hereinafter

referred to as "Appellate Court," August 10, 1962. The first point raised was, does the Circuit Court of Hardy County have jurisdiction to try the case?

The second point, do Secs. 1143(1) and 1144(2), Code 1955, violate the 5th and 14th Amendments, Constitution United States, hereinafter referred to as 5th and 14th Amendments, due process of law, and just compensation clauses, equal protection of the law, and abridge the privileges of citizens of the United States (Record "B" p. 1)

The plaintiffs filed their brief asserting the unconstitutionality of Sec. 1144(2), invoking the 5th and 14th Amendments and Art. 3, Secs. 9 and 10 of the State Constitution, contending that Sec. 1144(2) is repugnant to the guarantees they give the plaintiffs (Record "B" pp. 19, 28, 29, 30, 31).

The Appellate Court refused to docket the certification October 8, 1962 (Record "B" p. 33)

The plaintiffs filed petition for appeal and Appendix of Authorities and Reasons November 5, 1962. Excerpts from Petition (Record "C" pp. 2, 4):

> "It was error for the Circuit Court of Hardy County to hold:
>
> (1) That Section 1144(2) Code 1955 deprived the circuit court of the jurisdiction given it by Sec. 12, Art. 8, Constitution of West Virginia.
>
> (2) That an agent knowingly exceeding his stipulated authority, by doing acts that his principal and the law specifically forbid him to do, is not personally responsible acts.
>
> (4) That Sec. . . . 1144(2) . . . were not repugnant and derogatory to the 5th and 14th Amendments. . . .
>
> (7) That it was error for the circuit court to dismiss the declaration in the present case."

The Appellate Court refused to grant the appeal. December 11, 1962 (Record "C" pp. 1, 31)

The plaintiffs' petition for review of the court's action of December 11, 1962, January 12, 1963 (Record "C" p. 31)

"The Appellate court, "refused your second application for an appeal. . . ." January 21, 1963 (Record "C" pp. 1, 31)

JURISDICTION TO REVIEW. The jurisdiction of this Honorable Court to review the decree of the Circuit Court of Hardy County and the results of its operation and effect, by writ of certiorari is vested in this Court under 1257 (3), 28 U.S.C.

QUESTIONS FOR REVIEW

This Honorable Court is asked to review the decree of the Circuit Court of Hardy County, and the action of the Appellate Court on plaintiffs' appeal and the result of its operation and effect, and to determine if the plaintiffs have been deprived of their constitutional rights, federal or state (Record "C" p. 4 — Assignment of Errors)

1. Does the Circuit Court of Hardy County, West Virginia have jurisdiction to try the instant case?

2. Is Sec. 1144 (2) Code 1955, W. Va. repugnant to Sec. 12, Art. 8 of the Constitution of West Virginia, and or unconstitutional by its operation or effect on the instant case?

3. Have the individual or collective acts, conclusions, orders and or decree of the courts of West Virginia deprived the plaintiffs of the following federal and or state constitutional rights, 5th and 14th Amendments, and Secs. 9 and 10, Art. 3, Constitution of West Virginia, (a) due process of law, (b) the right of trial by jury, (c) equal protection of the laws, (d) no state shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States, [illegible] of federal or state constitutional rights?

4. Have the conclusions of the Circuit Court of Hardy County and the Supreme Court of Appeals of West Virginia, by operation or effect deprived the plaintiffs of any or all of their constitutional rights referred to in the preceding questions?

5. Does a state agent act for the state when he knowingly and continuously, wrongfully and illegally invades private property contrary to the limits of his instructions, and the law, over the protests of the owners of the property, or does he become responsible individually for his acts, subject to being stopped personally by injunction?

6. Does Sec. 1144 2 by the restrictions and burdens, physically and financially, its operation and effect impose on the plaintiffs and the citizens of West Virginia, outside of Kanawha County, and state agents, and by its phraseology, operation and effect exempt the citizens of Kanawha County and state agents from the financial and restrictive burdens it imposes on the plaintiffs and the citizens first referred to, deprive them of due process of law and equal protection of the laws, federal and state constitutions, by forcing them to pay a greater amount than the people of Kanawha County and agents of the state pay for the same protection, although the same protection at the same cost is available to them in the circuit courts of their respective counties, except for the prohibition of Sec. 1144 2 of the statutes?

7. Is Sec. 1144 2 Code 1955, unreasonable, arbitrary, without benefit, physically or economically to the state or to the safety, health, or comfort of the people, contrary to the 5th and 14th Amendments and to Secs. 9 and 10, Art. 3, state constitution?

8. The plaintiffs claim that Sec. 1144-2 by its operation and effect is unconstitutional and deprives them of the use and benefit of their land against their orders, contrary to the 5th and 14th Amendments, and that it deprives them of a forum to which they can resort to protect their said property.

CONSTITUTIONAL PROVISIONS INVOLVED. FEDERAL AND STATE

5TH AMENDMENT. No person shall be held to answer for . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14TH AMENDMENT. SEC. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 9. ART. 3. CONSTITUTION, WEST VIRGINIA. Private property shall not be taken or damaged for public use, without just compensation. . . . and, when private property shall be taken, or damaged, for public use, . . . the compensation for the owner shall be ascertained in such manner, as may be provided by general law: Provided, when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

SEC. 10. ART. 3. No person shall be deprived of life, liberty, or property without due process of law, and the judgment of his peers.

SEC. 12. ART. 8. The circuit court shall have the supervision and control of all proceedings before justices and

other inferior tribunals, by mandamus, prohibition and certiorari. They shall, except in cases confined exclusively by this Constitution to some other tribunal, have original and general jurisdiction of all matters at law where the amount in controversy, exclusive of interest, exceeds fifty dollars; of all cases of habeas corpus, mandamus, quo warranto, and prohibition; and of all cases in equity, and of all crimes and misdemeanors. They shall have appellate jurisdiction in all cases civil and criminal, where an appeal, writ of error, or supersedeas may be allowed to the judgment or proceedings of any inferior tribunal. They shall also have such other jurisdiction, whether supervisory, original, appellate or concurrent, as is or may be prescribed by law.

STATE STATUTES, ART. 2, CLAIMS AGAINST THE STATE.

SEC. 1144(2) PROCEEDINGS AGAINST STATE OFFICERS. The following proceedings shall be brought and prosecuted only in the Circuit Court of Kanawha County.

1. Any suit in which the governor, other state officer or state agent is a party except as garnishee or suggestee.

2. Any attempt to enjoin any judgment or decree for the state in any circuit court.

This section shall apply only to such proceedings as are not prohibited by constitutional immunity of the state from suits under Sec. 35, Art. 6 of the constitution of the state (1953 c. 18).

SEC. 1461(5) RIGHT OF EMINENT DOMAIN. The State Roads Commissioner or the state roads commission may acquire by right of eminent domain any land or water, or any interest therein, or any rights, ways, or easements thereon or thereover, for the purpose of constructing, widening, straightening, grading, or altering any state road, . . . or

for any other purposes authorized by any provision of this chapter, whenever a just compensation cannot be agreed upon by the owner or claimant of such property, for such taking, use, or damage.

STATEMENT OF CASE

(See Jurisdiction, grounds, supra, 1.)

The case is a bill for an injunction to stop the defendant from trespassing on the plaintiffs' property

The defendant is employed as State Roads Commissioner of West Virginia with power to exercise his judgment and discretion unlimited, except as to his right to acquire private property or damage it for public use which is forbidden by the state constitution, Secs. 9 and 10, Art. 3, statute Section 1461(5), supra, and federal constitution, 5th and 14th Amendments, say can only be taken adversely by right of eminent domain, supra, pp. 7, 8.

The trespasses complained of being in excess of the prescribed limitations of the authority of the State Roads Commissioner, and are contrary to the above stated laws are defendant's personal acts and responsibilities and are not the acts of the State of West Virginia.

Defendant filed "Motion to Dismiss" May 4, 1962.

Opinion of the Court filed June 7, 1962.

Decree, dismissing the suit filed July 13, 1962.

Questions certified to the Appellate Court on the circuit court's own motion, filed August 10, 1962.

Second question in certification was whether Secs. 1143(1) and 1144(2) were unconstitutional and violated the 5th and 14th Amendments? (Supra, p. 4.)

Plaintiffs filed brief supporting the jurisdiction of the Circuit Court of Hardy County to try the case and challenging the constitutionality of Sec. 1144, (2) and alleging that it is repugnant to the 5th and 14th Amendments, and Secs. 9 and 10, Art. 3 (Record "B" pp. 19, 28, 29, 30).

The Appellate Court refused the petition October 8, 1962.

Plaintiffs then filed petition for appeal and writ of error November 5 1962 (Record "C" p. 2, Assignment of Errors, No. 4, p. 9).

Appellate Court refused to grant the appeal December 11, 1962 (Record "C" p. 31).

Plaintiffs filed petition with the Appellate Court for a review of its decision January 12, 1963.

Appellate Court refused petition January 21, 1963.

The federal questions were argued in chambers with the judge before the decree was signed, and first appeared of record in the petition certifying the above questions to the Appellate Court and, were raised in the plaintiffs' petition for appeal and writ of error, in its assignment of errors, and argued in its Appendix annexed to the petition. The appeal was refused, and said federal questions were raised in the plaintiffs' petition to the Appellate Court requesting a review of their decision, and argued in the brief, asserting that Sec. 1144 (2) was unconstitutional and repugnant to State constitution, Sec. 12, Art. 8, and 5th and 14th Amendments of federal constitution, and that the decree of the court was unconstitutional and without authority.

> "No particular form of words or phrases was required for the assertion of a federal right." *Green Bay v. Patten*, 172 U.S. 58.
>
> "Where the invalidity of a state statute was set up by motion on the ground that it was repugnant to the federal constitution, the motion being made in arrest of judgment in the state court and denied, a federal

question was presented." *Consolidated Coal v. Illinois*, 185 U.S. 203.

"The denial of a federal right on petition for reargument was sufficient to confer jurisdiction." *Grannis v. Ordean*, 234 U.S. 385.

"If the federal question, reasonably raised, was decided by the state Supreme Court, it was immaterial that it was not regarded as being in issue in the trial court." *Chicago Rock Isl. v. Perry*, 259 U.S. 548.

"The Supreme Court had jurisdiction, when the state court decided a federal question on petition for reargument." *Cumberland Coal v. Board of Revision*, 284 U.S. 23.

"The Supreme Court is not required to inquire how and when the question of the validity of the statute was raised when such question had been actually considered and decided by the state court." *Charleston Fed. v. Alderson*, 324 U.S. 182.

"Question raised and adversely decided on application for second rehearing in state court was sufficiently saved for review." *Fleming v. Fleming*, 264 U.S. 29.

THE NECESSITY AND IMPORTANCE FOR THE WRIT OF CERTIORARI

The general sum up is divided into three serious points, not only to the plaintiffs but to all citizens of West Virginia. They create an urgent need for adjustment of the methods adopted by the State Roads Commissioner establishing rules that tend to abolish the guarantees of due process and equal protection, 5th and 14th Amendments and Secs. 9 and 10, Art. 3, State Constitution and Statute 1461 5 Code 1955.

POINT NO. 1. At what point does an agent cease to act for his employer and become personally responsible for the wrongful acts he perpetrates beyond the scope of his employment, to the damage of a third party."

POINT No. 2. Can the Act of Legislature, Sec. 1144(2) nullify Sec. 12, Art. 8, of the Constitution of West Virginia and deprive the plaintiffs of their constitutional right to try their case in the Circuit Court of Hardy County?

POINT No. 3. Sec. 1144(2), is contrary to the 5th and 14th Amendments, Sec. 12, Art. 8, Secs. 9 and 10, Art. 3, Constitution of West Virginia, and is unconstitutional, and deprives the plaintiffs of due process of law and equal protection of the laws, and is unreasonable, arbitrary and discriminating.

POINT No. 1.

When an agent exceeds his authority he is responsible for the consequences of his acts.

"One who without authority assumes to act for another is guilty of a wrong to a third person, and is liable for the damage sustained." Editorial notes: Corpus Juris Secundum, Vol. 3, Sec. 206.

"An agent is liable for his tort in the same manner as any other person." Sec. 220.

"An agent's liability for his own acts is unaffected by the fact that he acted in his representative capacity or by the authority or direction of another."

The bill of complaint asks the court to restrain the defendant, individually, who is employed as State Roads Commissioner, from continuing invasions of the plaintiffs' property, in violation of the law, his duty and authority, and who is wrongfully using state employees and equipment, under his authority and control, in the invasions.

No question is left as to the defendant's conduct in this case being completely beyond the scope of his duty and contrary to law.

The plaintiffs allege in the bill of complaint and insist that Mr. Sawyers' acts are deliberate and defiant and knowingly unlawful, and that all protests by the plaintiffs against his acts were ignored. The plaintiffs say that if the agent is personally responsible this suit against him personally cannot be affected by the jurisdiction stated in Sec. 1144(2), as it relates only to state agents, and the decree based on the venue fixed by that statute would be erroneous and should be reversed.

Concurring opinion by Kenna, President:

p. 447. "If the agents of the state, or rather the individuals who occupied the position of state agents are engaged in the wrongful appropriation of private property, or is damaging it, they as individuals exceeding their rightful powers, may be enjoined, and summary end put to the abuse."

p. 448. "I think that the state agents should be subject to injunction as individuals acting beyond the scope of their public employment . . ."

p. 451. ". . . where private property is being taken or damaged for public use without just compensation, the individuals responsible are not acting for the State of West Virginia, but are exceeding their lawful rights as public officials, and as individuals are amenable . . . by injunction or by damage suit, to stop or respond in damages." *Hardy v. Simpson*, 118 W. Va. 440.

"The provisions of our constitution and the due process clause of both federal and state constitutions are limitations upon the authority of the sovereign to take private property for public use." *Kanawha County*, 76 S.E. 2d 271; *Blivin*, 131 W. Va. 350.

"The liability of the master does not arise when the servant has stepped aside from his employment to commit a task which the master neither directed in fact nor could be supposed from the nature of his employment to have authorized or expected the servant to do." *Central Ry. Co. v. Peacock*, 69 Md. 257.

"A master is answerable for all the injuries from the negligence, unskillfulness of his servant in executing duties assigned to him; but when he abandons his duties, and willfully becomes a wrongdoer, the master is exempt from all responsibility for such wrongful acts." *Brown v. Purviance*, 2 H. & G. 316 (Md.).

"An agent may owe a duty to third persons at the same time that he owes a duty to his principal this duty is nonetheless binding upon a person because he happens at the time to be an agent." *Rising v. Ferris*, 216 Ill. App. 252. See also *Chiarello v. Pedersen*, 242 F. 482.

The plaintiffs say that the duty the defendant owed them was a constitutional duty, both federal and state, and one regarded as going to the root of the security of property and person, and should be carefully preserved. Couple that duty to a rebellious, and defiant agent and you have a malfeasance in office of the most dangerous character.

"Every person is liable who personally or by agent commits an act of commission or who participated, by instigating, aiding or assisting another. An agent or servant who converts the property of a third party is liable for such conversion, and it is no defense if his acts were committed in pursuance to his employment or for the benefit of his principal or master, though the servant or agent was under a bona fide belief that his master or principal was owner of the property." *Passaic Falls v. Villenure-Pole*, 169 App. Div. 727, 155 N.Y.S. 669; *Olvany v. Nyamco Associates*, 278 N.Y.S. 246.

"The president and general manager of a lessee of a theater who has general control of the theatre and its operation and makes subleases and contracts for the use of the theatre auditorium is personally liable for personal injury to a child taking part in a rehearsal for a play for which the theatre had been leased, through burns caused by her clothing being set afire by contact with a switchboard, not guarded as required

by ordinance, of the condition of which defendant had knowledge." *Rising v. Ferris*, 216 Ill. App. 252. See also *Meyerson v. New Deal*, 55 A.L.R. 1231, 217 Ala. 153; *Coffer v. Bradshaw*, 46 Geo. App. 143; *Crambit v. Percival*, 176 Iowa 733.

"If an agent's conduct complained of involves only a duty arising from a contract between him and his principal, and therefore solely to the principal, then no liability on his part to third party exists, Tibbetts v. Wentworth, 248 Mass. at 472; Hans v. Miner, 258 Mass. at 62, but if that conduct also involves a duty to a third person — a duty imposed by law arising out of the circumstances — then such third person has a right of action against the agent if he fails in performing this duty, and the contractual relations to the principal does not interpose a defense." *Coe v. Ware*, 271 Mass. 573.

The defendant's duty not to damage or take private property without just compensation is a duty imposed by law.

POINT NO. 2.

Section 1144(2) is Unconstitutional
(Code West Virginia, 1955)

The plaintiffs believe that Sec. 1144(2) is a vicious attack on the principles upon which this Government is built.

When the time comes that acts of legislation are possessed of the inherent power to destroy or even weaken in the slightest degree the literal meaning of the words of the federal or state constitutions, I say the moment for preemptive action has arrived. The Federal constitution is the supreme law of the land, likewise the constitution of a state is the supreme law of the state, and is above legislative interference.

In the case of *United States v. Wheeler*, C.C.A. (8), 66 Fed. 977 the court said: "One cannot lessen the protection of the Fifth Amendment, not even congress can do that. . . ."

And in *Byars v. United States*, 273 U.S. 28, "Constitutional provisions for the security of person and property are to be liberally construed, and it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon."

In *West Virginia v. Early*, 109 S.E. 2d 42 the Court said, "The legislature cannot restrict or impair the power of the courts." They are constitutional tribunals and their jurisdiction is fixed by the constitution.

In *Reynolds Estate*, 116 W. Va. 249, "Thus maintaining the right of review to the courts since a constitutional right cannot be taken away by legislative mandate."

The constitution Sec. 12, Art. 8 says, (Excerpts) "The circuit court shall have . . . original and general jurisdiction of all matters of law . . ., and all cases of equity. . . ."

The sole purpose of Sec. 1144(2) is stated in the first and second paragraphs:

> "The following proceedings shall be brought and prosecuted in the Circuit Court of Kanawha County.
>
> 1. Any suit in which the governor, or other state officer or state agency is a party. . . ."

The effect, of this unilateral act, is to lessen the jurisdiction of 54 of the 55 counties of the State and when I say lessen it refers to lessening the constitutional jurisdiction of the 54 counties, and so I ask, by what power is this constitutional jurisdiction lessened and the answer is, by mandate of the legislature, Sec. 1144(2).

But says the courts: "The legislature cannot restrict or impair the power of the courts." supra.

"Thus maintaining the right of review to the courts since a constitutional right cannot be taken away by legislative mandate." supra.

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon." supra.

What effect does the statute have on the constitution of West Virginia? Well so far it has nullified this case by the misinterpretation of power by the Circuit Court deciding that the jurisdiction fixed by Sec. 1144(2) prevailed, and it dismissed the plaintiffs' case, and finally, by the act of the Appellate Court sanctioning the decree of the lower court by refusing to allow an appeal, specifically assigning the question of federal and state constitutional jurisdiction as a ground for appeal.

The Appellate's action in refusing the petition for appeal is contradictory to their expressed opinion.

The plaintiffs contend that their right to resort to the Circuit Court of Hardy County is a sacred right based on the state constitution and the 5th and 14th Amendments, and that any case brought within the jurisdiction of that court fixed by the constitution of the state is a legal right of which the plaintiffs cannot legally be divested by a state legislature, and denying them that right is contrary to the 5th and 14th Amendments, and Secs. 9 and 10, Art. 3, and Sec. 12, Art. 8, state constitution.

If such interference were to stand the legislature could piece by piece or by one complete act nullify any constitution. Such a thought is ridiculous, but Your Honors now have it squarely before you.

POINT NO. 3.

Sec. 1144(2) is the source of nearly every unconstitutional act complained of.

Untold number of cases, by restricting their jurisdiction to Kanawha County, and by reason of the heavy expense to get from their homes to Kanawha County, are barred by circumstances imposed on them by this unreasonable and arbitrary section the expense being beyond their ability to meet. For example, from Jefferson County one would have to travel 800 miles, requiring three days, house and feed himself and his witnesses for six or seven days, lawyer in home county and Kanawha County. In dollars it could easily exceed $600.00 (court cost not included) this compared to the man in Kanawha County who can reach the court in less than an hour, tend trial and be home for supper, witnesses would be away from their work three or four hours, at a cost of about $25 or $30.00.

Is this equal protection for the man in Jefferson County? Is there any reason to force him to go to Kanawha County and shoulder that unnecessary expense, or forego the protection the constitution guarantees him when he has a circuit court of the same commensurate jurisdiction as the court in Kanawha County, running every day, within an hours ride of his home, available for him except for Sec. 1144(2)?

Constitutional guarantees mean nothing to a man when the law is arbitrarily placed so far from his home that he cannot reach it. How can he protect his property from damage or encroachment against a recalcitrant state agent? Besides the cost to get to Kanawha County could be more than the damage would amount to. A poor man should not be deprived of the protection of the law to save his mite, any more than the average man should be made to carry

a burden to protect his property, imposed on him by a statute that helps to comfort and convenience a few and hurts many.

Most claims against state agents are because of their acts of trespass and are divided into mandamus to compel acts of duty or injunction to prevent illegal acts.

Remember the only thing the statute does is to force these suits to be brought to Kanawha County. Is there any benefit the state or the people of the 54 counties derive from this? There is no safety, benefit, health, profit physically or economically, nothing but hardships of which this case is evidence. The case was filed April 11, 1962, not a move has been made to correct the conditions, nor has the Commissioner given ear to the recommendations of the judge stated in his opinion June 1, 1962 (App. 1, p. 31). The obstacles and cost to get to Kanawha County have made many people forego the law, and lost their property by brute force.

Is the State Roads Commissioner doing the right thing? According to his oath to support the Constitution of the United States, 5th and 14th Amendment against taking and damaging private property, ignoring complaints and even the judge's recommendation to contact the plaintiffs and save cost and expense to everyone, telling the Commissioner that the State was trespassing on private property? The defendant had the court's opinion June 7, 1962. He knows no one in the outlying counties is coming to Kanawha County to sue. In most cases it is a losing matter because of the cost. The Commissioner's legal adviser writes them and says in substance, you lose and he wins, (Samuel's letter to plfs.). Is this the right thing to do?

The "Motion to Dismiss" by implication says the Commissioner is the real defendant, but he has not done a single

thing to adjust the matter, nor kept off the plaintiffs' land either as agent or individual, but instead he is trying to shift the responsibility of his own wrongdoing onto the State?

Would Your Honors say that such examples of defiance of constitutional laws, state and federal, or such misfeasance or malfeasance in office is failing to show the seriousness and importance of the situation to the plaintiffs and the people of the state?

To show YourHonors that this contention is not fanciful and what can be expected of the defendant, I will quote from a letter written on State Roads Commission paper dated March 13, 1961 and signed, George H. Samuels, Legal Assistant, I assume one of the Attorney General's staff, stating the method followed by the Commissioner in acquiring private property for public use for right of ways:

> "The question often arises, 'writes Mr. Samuels', as to the width of right of ways to which the Commission has no paper title, no deed, order of county court or other paper designating its title, or the extent of the width of the right of way owned . . . The rule in such cases as this is that, in the absence of documentary evidence to the contrary [Commissioner had a complete chain of title of plaintiffs' property] roads established prior to 1933 which were Class A county roads, have a right of way of 40 feet in width . . ." The State took over roads in 1933.

What effect would such a letter have on the average property owner? He would fall an easy prey to such bold assertions, fearlessly and defiantly made, in the strain of fighting words to the property owner. The plaintiffs say, more than ever the opportunity to gaining access to courts is in demand for speedy and ready action for defense of private property, and that steps to make it more difficult for some people over others, as Section, 1144 2) is endeavoring to do, should be opposed, and is unconstitutional

This is what the U.S. Judicial Code 28 U.S.C. 1404(a) provides, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to another district or division where it might have been brought."

Hear what the Appellate Court of West Virginia had to say on accessibility of courts:

> "They were enacted in recognition of the great importance to the people of keeping the courts open and judges accessible at all times to deal with any legal emergencies that might arise, and in conformity with our constitutional injunction that the courts of the state shall be open and justice shall be administered without fail, denial, or delay. . . . Plainly, they must not be permitted to bring about a conflict of function between two or more circuit judges." *Hyman v. Huntington*, 119-W. Va. 44.

and I add to this: or conflict of function between circuit courts by resorting to class, unreasonable and arbitrary legislative acts of discrimination.

Mr. Samuels says in his "Motion to Dismiss" that damaging private property by the Commissioner is not illegal because of his right to use discretion. The constitution federal and state prescribe the only way he can acquire private property and has approved it in the leading case by detailing how property can be taken.

> "The taking of private property for public use, without the owners consent, can only be justified for the use, in the mode, upon the conditions, and by the agencies prescribed by law for the appropriation. Whenever the private property of an individual is to be so divested by proceedings against his will, a strict compliance must be had with all the provisions of the laws, which are made for his protection and benefit, or the proceedings will be ineffectual. These conditions must be complied with before the right of the property

> owner is disturbed, but, the party claiming authority under the adverse proceedings must show affirmatively such compliance. All authorities concur in holding that private property can be taken for public use against the consent of the owner, only in such cases, and by such proceedings as may be specifically prescribed by law, and as these proceedings are contrary to the course of common law, and are in derogation of common rights, they are to be strictly construed, and that the party who would avail himself of this extraordinary power, must fully comply with all of the provisions of the law entitling him to exercise it.' *Adams v. Clarksburg*, 23 W. Va. 203.

These conditions demonstrate the existing local need for protection of private property, and to have legislation that casts shadows on the guarantees of the federal and state constitutions be carefully reviewed. Taking or damaging private property by administrative rules instead of in conformity with the state and federal constitutions is a definite danger, and worthy of careful consideration by the highest Court in the land.

This Sec. 1144(2) mounts up that it is unreasonable; discriminates; devoid of public benefit; conflicts with constitutional provisions, State and Federal; favors the people of Kanawha County and hundreds of state agents and imposes hardships on the people of the other 54 counties of the state, some of considerable amounts (by reason of the distance of their homes from Kanawha County. (See also Record "C" argument and authorities on appeal, Assignment of Errors No. 4, pp. 9, 10, 11.)

UNREASONABLENESS OF SECTION 1144(2)

The conclusion is inescapable that the reason for lessening the jurisdiction of the 54 counties was a matter of pure selfishness on the part of state agents in Charleston, the state capital and county seat of Kanawha County; who otherwise would be compelled to leave their homes to tend

court trials, usually brought in the county where the wrong complained of was committed, but now the statute forces the innocent person to come to the court most convenient to the agent charged with the wrongdoing, this is the only conceivable reason for the statute, pure selfishness with no regard for the public interest or welfare.

The state agencies profiting the most by this statute are the State Roads Commissioner and the Attorney General's office. I know the present occupants of these agencies had nothing to do with this legislation, but its effect and operation is the same today as it was then, and this I have to lay at their doors, for it is repugnant to the 5th and 14th Amendments and Secs. 9 and 10, Art. 3, and Sec. 12, Art. 8, of the state constitution, as unreasonable, arbitrary, discriminating and classified, and it provides no benefit to the public health, convenience, safety, economy, comfort, welfare, protection, living conditions, work, recreation or pleasure.

The statute says to the plaintiffs, you will have to go to Kanawha County to bring your suit, three hundred miles away, to file your request for an injunction to stop the continued trespass on your land in Hardy county, although you have a court of competent jurisdiction you could resort to in Hardy County less than thirty miles from your home except for Sec. 1144(2) barring its use. This is the answer to hundreds of cases, similar to the plaintiffs, receive.

Could anything be more unreasonable and arbitrary than this?

They are certainly deprived of equal protection of the laws and are discriminated against, capable of mathematical determination in cash.

ESTIMATED EXPENSE TO KANAWHA COUNTY based on man and wife and two witnesses, from Hardy County, over 300

miles away, three days traveling, three days in court. The road is mountainous ranging in elevation to three thousand feet, with no means to get to Kanawha County from the Northeastern section of the state but by private automobile, no railroad, bus, or any other method.

Hotel 2 rooms 5 days @ $9	45.00
Automobile expense 600 miles	90.00
Meals, Din. $13, Break. $5, Lun. $3, 6 days	126.00
Recompense witnesses from work 2 @ $12	144.00
2 men to care for witnesses' stock @ $6	36.00
Total	$441.00

Estimated unnecessary cost to plaintiffs $375.00 more than it would cost them to try their case in Hardy County.

Can this statute legally deny the people in the outer counties the saving they would have by using their own county court? Is it legal to penalize them for living there? Many people could not raise the money to go to Kanawha County. Many of them only have a home built house and a few acres of land and at this very minute are being illegally encroached on by state agents. The state has no title to hundred of acres of land it is poaching on illegally. In most instances this wrong could be corrected by injunction at little cost. Granting the protection the plaintiffs seek will benefit the whole state, not only by restoring to them their constitutional rights but to have the uncertainty of the jurisdiction of these courts settled.

In *Borden Farms, v. Ten Eyck*, 297 U.S. 251, this court said:

> "In determining constitutionality of legislative classification judicial inquiry does not concern itself with accuracy of legislative findings, but only with the question of whether it is so lack in reasonable basis as to be arbitrary."

In *Plessy v. Ferguson*, 163 U.S. 550, the Court said:

"In determining reasonableness of a police regulation, a state legislation is at liberty to act with reference to the established usages, customs, and conditions of the people, and with a view to the protection of their comfort and preservation of the public peace and good order."

In *Dearborn v. Segram*, 299 U.S. 61 the Court said:

". . . voids what is done only when it is without reasonable basis and therefore is purely arbitrary."

In *Stierl v. Rohmeyer*, 260 N.W. 647, it is said:

"Statutes under police power must be reasonable which means what from common sense applies to whole situation is not illegitimate in view of end to be obtained, and it is for the court to decide whether statute relates to legitimate subject, or under guise of doing so, violates rights of person or property."

In *Min. Ry. v. Beckwith*, 129 U.S. 28, covers considerable of the plaintiffs' case:

". . . violates the Fourteenth Amendment, in as much as it gives double damages for railroad failure to fence against animals straying on tracks of railway, being a different liability for injuries committed by it from that which other persons are subjected.

"Equal protection of the law does prohibit discrimination and partial legislation by any state in particular persons as against others in like condition. Equal protection implies not merely equal accessibility to courts for the prevention of redress of wrongs and the enforcements of rights, but equal exemption with other, in like condition from charges and liabilities of every kind. . . . The state can now, as before, prescribe regulations for health, good order and safety for society, and adopt such measures as will advance its interest and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, pro-

viding against accident, disease, and danger, in various forms in which they may come. . . .

"The Fourteenth Amendment simply requires that such legislation shall treat alike all persons brought under and subject to it. The equal protection of the law is afforded when this is accomplished."

DUE PROCESS AND EQUAL PROTECTION OF LAWS UNREASONABLE AND ARBITRARY.

I respectfully direct Your Honors' attention to the importance to legislative acts that they be reasonable and free from arbitrariness, that they treat all alike and that they be consistent with an object and base in view.

In this case I have searched carefully for these elements in the challenged statute, 1144(2) without success. What benefit to the public is limiting the court's jurisdiction in 54 of the 55 counties of the state to a single court, instead of leaving it where the constitution put it? What was reasonable in saying to the people of those counties they can no longer use their own courts but must go to Kanawha County to protect their property against encroachment by state agents? It does nothing for health, safety, comfort, welfare, or from any other source.

What is the basis or object of the litigation or as the purpose of the statute states, in what way has it simplified or expedited handling claims against the state? The fact is that the act has given the state nothing but has deprived the people of the convenience and benefit of their own courts economical use. In many cases the jurisdiction of Kanawha County is so far away that it is hopelessly worthless in cases demanding speedy action for injunctions.

The courts say that laws benefitting special groups or classes to the exclusion of the public are classified and unconstitutional.

The law has benefitted Kanawha County by the convenience of its court, by the influx of people and the money they spend with the merchants and other business enterprises by the spending of money in Charleston that they would be spending in their own county seat, the 54 counties shares in none of these profits, physical or financial. As to the 54 counties the law has not been changed but has only been robbed. The 54 counties have been pilfered of a valuable part of its jurisdiction, but the jurisdiction is still written in the state constitution and is still the law and any decree to the contrary is erroneous.

> "The purpose of this clause is not to confer new rights, but to furnish additional guarantees against encroachment by state on fundamental rights belonging to citizenship of United States, as distinguished from citizenship of the several states." *Hinebaugh v. James* (1937), 119 W. Va. 162.
>
> "Equal protection guaranteed by the courts, forbids the legislature to select a person, natural or artificial, and impose upon him or it, and others similarly situated. It cannot pick out one individual or corporation and enact whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subject to the same rule.
>
> "Neither can it make classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object to be accomplished the same conclusion of unconstitutionality is affirmed." *Atcheson Ry. v. Matthews*, 174 U.S. 104.
>
> "A statute containing classification not based on reasonable or some difference bearing just and proper relation to object sought to be accomplished is discriminatory." *Allen v. Dorell* (1949), 193 Md. 359.

ment for that is settled by the federal constitutions, supra. His violations of duty are twofold, he violated his duty to the State and to the plaintiffs, under such facts the plaintiffs charge the defendant, Sawyers with the responsibility for the acts of trespass and not the state.

Mr. Justice Cardozo said, *American Telephone v. United States*, 299 U.S. 232, "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers." This statement impresses the plaintiffs that the reverse is true that the court will substitute its discretion when the agent's act is out of bounds.

The *Floyd Acceptances*, 7 Wall 666, 19 L. Ed. 169, Mr. Justice Miller said, if a man is sent to buy a horse and he buys land he cannot bind his principal. "Such a doctrine would enable a man in private life, to whom a well defined and limited authority was given to ruin the principal . . ."

Under these authorities and those submitted in the argument the defendant in this case is properly named and that the decree relying on Sec. 1144(2) to dismiss the case for want of jurisdiction was erroneous, and deprived the plaintiffs of due process of law and equal protection of the laws and should be reversed and remanded for further action.

For these special and the other reasons stated in the petition the plaintiffs respectfully submit the petition to your Honors' consideration, and that the Certiorari be granted as prayed.

LEWIS W. LAKE,
3003 N. Charles Street,
Baltimore 18, Maryland.

APPENDIX 1

In The
Circuit Court of Hardy County, West Virginia

Mary Lee Lake, et al., Plaintiffs,

vs.

Burl A. Sawyers, Defendant.

The Plaintiffs are asking for injunctive relief against the Defendant.

The case was set down for argument before the Court on June 1, 1962, at 2 o'clock P.M. to argue the motion to dismiss the action against the Defendant for reasons assigned.

Thereupon appeared Lewis W. Lake, Attorney for Plaintiffs, and H. Watson Starcher, Attorney for Defendant, and proceeded to argue the motion before the court.

COURT'S OPINION

The Court will take judicial notice of the fact that a similar suit was instituted by the same Plaintiffs, but in that case the Defendant was named as State Road Commissioner, and the Court held that the Plaintiffs had not instituted their action in the proper county, because Chapter 14, Article 2, section 2 of the West Virginia Code requires such a proceeding, which involves a state agency, to be brought in the county where the Capitol is located, namely, Kanawha County. The Court will further take judicial notice of the fact that Burl A. Sawyers, the Defendant in this case, is the State Road Commissioner of West Virginia. Also judicial notice will be taken that the Defendant, although sued individually, is using state road equipment and expending state road funds concerning the alleged trespasses contained in Plaintiffs Bill of Complaint.

The Motion to Dismiss does not squarely say that the action should be dismissed because of the wrong venue, but Ground I is so worded that in the Court's decision will treat it for all practical purposes as being the issue involved.

For some reason the Legislature saw fit to pass a law which fixes the venue when any state agency is involved. Chapter 14, Article 2, section 2 so states.

In reading the Bill of Complaint and hearing the arguments of counsel, the Court is of the opinion that Plaintiffs do have a cause of action, and that they should be protected in their property rights and the trespasses complained of should be passed upon by court having competent jurisdiction. The Court further believes that an action by injunction is proper procedure to stop any illegal acts, or any acts of trespassing, and believes that the case of Hardy v. Simpson, reported in 118 W. Va., p. 448, is a proper authority for such. However, that case dealt with land located in Mercer County, but the proceeding was that of an original mandamus proceeding starting directly in the Supreme Court.

The Court is impressed with the case cited by counsel for Plaintiffs concerning the fact that land owners must have just compensation, which is reported in 23 W. Va. 203, and believes that to be good law, and further thinks that the case is applicable here, providing we are permitted to take jurisdiction concerning the issue involved.

The office of State Road Commissioner shifts from time to time, being a political appointment, and is usually determined by the Governor at his selection. Also it is a fact that the Defendant herein as an individual has not expended any of his personal money concerning the alleged trespasses, and all of his employees and equipment are that of the State Road Commission. Thus the question arises whether or not the case cited by Defendant, reported in 68 W. Va. 492, is applicable here, which in substance says that the above section as to venue cannot be successfully evaded by suing individually to avoid the real party in interest. Then too, to grant an injunction as prayed

for, would that or would it not be equivalent of a judgment against a state agency, as argued by counsel for Defendant, which would be against the findings of the case reported in 103 W. Va. 432. When the first case was submitted to this court as stated above, it was held such violated the section in question as to venue. Therefore the question arises whether this would not be permitting something done indirectly which the section prohibits to be done directly as far as venue is concerned.

This Court is of the opinion that there would be no question concerning the relief requested, either in the original action when the State Road Commissioner was made a party as such, or in this action where the Court would take judicial notice of the fact that the Defendant is the State Road Commissioner, if the proceedings had been brought in Kanawha County. Also this Court is of the opinion from the facts alleged, and not denied, and likely cannot be successfully contested, that the Plaintiffs would most certainly have a good cause of action if they were to seek mandamus against the State Road Commission to compel the Commission to condemn the property in question to be used for state road purposes. Also this Court is of the opinion from the pleadings and argument of counsel, and admissions made, that the State Road Commission does not own all the right-of-way in controversy, and that they are in fact trespassing on the property owned by the Plaintiffs, and to that extent their acts of trespassing are illegal.

However, the main issue before the Court now is that of venue, and from what has been said above and after studying the decisions submitted by both parties, and taking judicial notice of the matters stated above, this Court is of the opinion that the alleged suit covers the subject matter over which Hardy County Circuit Court does not have jurisdiction.

However, this Court recommends that since there would be no question about a proper mandamus suit being likely successful, but would require the Plaintiff the expense of going to Kanawha County, and further, that an injunction case by the Plaintiff in the proper jurisdiction, based upon the allegations that likely cannot be contested suc-

cessfully, would also be sustained. Therefore this Court recommends to the State Road Commission that if a settlement cannot be promptly worked out between the parties, that the State Road Commission promptly institute a condemnation proceeding in this county for the purpose of avoiding additional litigation and additional expense, because such would not only protect the plaintiffs but it would protect the public and the State Road Commission, and would be in accordance with the spirit expressed by the Judge who rendered the able opinion in the case reported in 23 W. Va. p. 203.

An order of dismissal therefore will be entered at this time.

H. G. MUNTZING,
Judge.

APPENDIX II

In The
Circuit Court of Hardy County, West Virginia

Civil Action 148

Mary Lee Lake and Lewis W. Lake, her husband,
Plaintiffs,

vs.

Burl A. Sawyers,
Defendant.

DECREE

On the first day of June, 1962, came the plaintiffs by their attorney, Lewis W. Lake, Esquire, and came the Defendant by H. Watson Starcher, his attorney.

Whereupon the defendant, by counsel, presented argument on behalf of his motion heretofore filed seeking to

have this case dismissed for lack of venue by the Court, which motion was resisted by the plaintiff.

AND IT APPEARING PROPER so to do, it was ADJUDGED, ORDERED AND DECREED that this case be and the same is hereby dismissed and stricken from the docket of this court, without prejudice to the right of the plaintiffs to institute further action in a proper court of this State.

THE COURT being of the opinion that the question raised and argued on the motion made by the defendant, to dismiss the action for lack of jurisdiction of the Circuit Court of Hardy County over the subject matter, is of sufficient importance to justify the certification of this question to the Supreme Court of Appeals of this State for a decision thereon, both upon it's motion direct that a proper certificate be prepared clearly presenting the question raising upon the bill of complaint and the motion to dismiss the same for lack of venue and that said certificate, when signed by this Court, accompanied by a certified copy of said bill of complaint and all exhibits filed herein, of the motion to dismiss, of the written opinion of the Court by this order filed herein, of any and all other parts of the record in this case necessary for determination of the question set forth in such certificate, and of this order, shall be forwarded to said Supreme Court of Appeals of West Virginia for the decision of the said Court thereon.

Enter:

H. G. MUNTZING,
Judge.